UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 02-11119-RGS

VICTORIA GIANNONE

v.

METROPOLITAN LIFE INSURANCE COMPANY,

MEMORANDUM AND ORDER ON
PLAINTIFF'S APPLICATION FOR
ATTORNEYS' FEES AND COSTS

July 16, 2004

STEARNS, D.J.

On March 30, 2004, this court found that the defendant, Metropolitan Life Insurance Company (MetLife), had abused its discretion in terminating Victoria Giannone's long-term disability benefits. Pursuant to 29 U.S.C. § 1132(g)(1), Giannone was invited to submit an application for attorneys' fees and costs. MetLife opposes the application, asserting that the factors relevant to an award of fees militate against an award, but also argues that if the court in its discretion is inclined to make an award, that Giannone is not entitled to be reimbursed for work performed by her attorneys during the administrative appeals process, or for tasks that were redundant or unnecessary.

BACKGROUND

This case involves a claim for long-term disability benefits and is governed by the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001-1461. The underlying facts are set out at length in Giannone v. Metropolitan Life Insurance Co., 311 F. Supp. 2d 168 (D. Mass. 2004). In brief, Giannone worked as a

sales representative for Unitax, a subsidiary of McDonnell Douglas Corporation. In January of 1987, she began receiving long-term disability (LTD) benefits under McDonnell Douglas's Long Term Disability Insurance Plan (Plan). Giannone's claim was administered by General American Life Insurance Company (GenAm) until late in 2000 when MetLife succeeded GenAm as the claims administrator of the Plan. In April of 2001, MetLife determined that Giannone was no longer disabled under the terms of the Plan. After two unsuccessful administrative appeals of the decision, the last of which was definitively rejected on April 18, 2002, Giannone brought a Complaint on June 4, 2002 in the federal district court. In its March 30, 2004 Memorandum and Order, the court ruled that while MetLife's decision to terminate Giannone's LTD benefits was subject to a deferential review under the arbitrary and capricious standard, MetLife had abused its discretion. Essentially, the court ruled that there was insufficient evidence to support MetLife's conclusion that Giannone's disability was psychiatric in origin and, if it was, that MetLife had assembled no evidence to support its determination that Giannone was capable of gainful employment. After the entry of judgment for Giannone, she filed the instant application seeking attorneys' fees in the amount of $45,830.00 and $150.00 in costs.[1]

[1]Giannone's attorneys' fee application does not quantify the amount sought. It states that "counsel [Attorney Crowley] is requesting 100.05 hours [be reimbursed] for compensable time spent in the context of litigation" and "12.1 hours of compensable time spent on pursuit of the administrative appeal. . . . [F]or costs, [p]laintiff only seeks $150 for the filing fee." Also attached are the billing records of Attorney Feigenbaum (indicating an investment of 47.6 hours in the case) and affidavits in support of his hourly rate. The application does not ask in so many words for an award of Feigenbaum's fees. However, the supporting memorandum makes reference to counsels' collaboration and "good faith attempt not to bill for unnecessary or duplicate efforts." The court will assume, therefore, that the application is for 112.15 hours of Crowley's time at $300 per hour and 47.6 hours of Feigenbaum's time at $250 per hour, for a total fee award of $45,680.

DISCUSSION

Pursuant to 29 U.S.C. § 1132(g)(1), this Court "in its discretion may allow a reasonable attorney's fee and costs of action to either party." Unlike the case with many other fee-shifting statutes, a fee award under ERISA is not "automatic" but "wholly discretionary." Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220, 225 (1st Cir. 1996). An award therefore will be disturbed on appeal "only if the record persuades us that the trial court 'indulged a serious lapse in judgment.'" Id. at 223.

The First Circuit has identified five non-exclusive factors that a court should consider when ruling on an application for fees under ERISA: (1) the bad faith or culpability of the ERISA decision maker; (2) the ability of the Plan or the administrator to satisfy an award of fees; (3) whether an award would have a deterrent effect in similar cases in the future; (4) the extent to which the litigation conferred a benefit on other Plan members; and (5) the relative merits of the parties' positions. Gray v. New England Tel. and Tel. Co., 792 F.2d 251, 257-258 (1st Cir. 1986).

It is easy enough to shoehorn the respective parties in or out of these considerations, as the parties do in their briefs. That MetLife acted arbitrarily might be taken as a sign of obstinacy and bad faith, as Giannone argues. But see Gray, 792 F.2d at 259 (mere unreasonableness "does not require a fee award" under ERISA). For all the record shows, the decision to terminate Giannone's benefits may have been the mistake of an inexperienced claims examiner, or a reflection of the not always unjustified frustration on MetLife's part with Giannone's failure to fully cooperate with the review of her disability

status.[2] That MetLife (or the Plan) will suffer no tangible financial hardship from an award of fees is not a point that MetLife contests. And it may be that the experience will cause MetLife to evaluate cases like Giannone's more carefully in the future, with a corresponding benefit to Plan members who, like Giannone, suffer from ill-defined ailments like fibromyalgia.

It is the last factor – the relative merits of the parties' positions that militates most strongly in favor of a fee award in this case, although not for the usual reason that the evidence overwhelmingly established that the claimant was disabled.[3] As MetLife fairly points out, the medical record was thick, complex, and in some aspects contradictory, as Giannone's condition baffled some of her own physicians. Nonetheless, Giannone, who was confronted with the formidable "arbitrary and capricious" standard of review, faced a considerable uphill battle in vindicating her claim, as plaintiffs whose cases are adjudicated under this harsh – from a plaintiff's perspective – standard rarely prevail on judicial review. In instances where a plaintiff does prevail, the award of lost benefits is typically (as here) not a princely sum. Without some prospect of a fee award, it would be difficult, if not impossible, for a deserving plaintiff to enlist the aid of an attorney of any experience in challenging the nearly insurmountable "abuse of discretion" standard that the law requires be applied in cases like Giannone's.

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[2]MetLife makes the not inconsiderable point that it did not rush to judgment, but gave Giannone numerous opportunities to supplement the record during the appeals process.

[3]As the court found, the obverse was true – that MetLife had assembled no convincing evidence to support its decision. That is not to say that it is inconceivable that such evidence might not have existed.

Because Giannone's attorneys, by taking her case, were willing also to take the considerable risk of earning nothing at all, I conclude that an award of fees is appropriate.[4] However, I agree with MetLife that the amount requested is excessive. First, I will not award fees for time spent pursuing administrative remedies prior to the advent of litigation. Until the First Circuit considers the issue, I will follow the lead of other federal circuits who have unanimously concluded that "ERISA attorney's fees [are] categorically unavailable for expenses incurred while exhausting administrative remedies." See Rego v. Westvaco Corp., 319 F.3d 140, 149-150 (4th Cir. 2003); Anderson v. Procter & Gamble Co., 220 F.3d 449, 455 (6th Cir. 2000); Cann v. Carpenters' Pension Trust Fund for Northern California, 989 F.2d 313, 316 (9th Cir. 1993). This categorical rule seems reasonable enough, as the time spent on an administrative appeal is usually limited to the few hours necessary to assemble a paper record and to properly complete the necessary appeals forms, and thus within the means of the typical claimant who feels that the assistance of a lawyer is necessary in the administrative stages of the case.[5] Moreover, a denial of an award for administrative fees and expenses is consistent with the literal terms and ultimate goals of the ERISA statute itself. The Fourth Circuit explained it well in Rego.

> ERISA is characterized in part by a congressional "desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." Varity Corp., 516 U.S. at 497, 116 S.Ct. 1065. For this reason,

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[4]I do not mean to suggest that risk always entails award. I mean only that in the circumstances of this case, risk in the face of a medically difficult record and a high legal barrier to success, deserves special consideration.

[5]I do not rule out the possibility that an administrative appeal might be handled in so arbitrary and ruthless a fashion as to justify a fee award on grounds of deterrence.

> Congress required benefits plans to create internal dispute resolution procedures in order "to minimize the number of frivolous ERISA lawsuits; promote the consistent treatment of benefit claims; provide a nonadversarial dispute resolution process; and decrease the cost and time of claims settlement." Makar v. Health Care Corp. of Mid-Atlantic (Carefirst), 872 F.2d 80, 83 (4th Cir.1989). If attorneys were injected into those administrative procedures as a matter of course, it would establish a far higher degree of formality and lead to more protracted litigation in a great many cases. The resulting combination of increased litigation costs and decisions by benefits plans to pay questionable claims so as to avoid such costs could severely undermine the congressional purpose of promoting "the soundness and stability of plans with respect to adequate funds to pay promised benefits." 29 U.S.C. § 1001(a) (2002); see Cann, 989 F.2d at 317.

Id., 319 F.3d at 150. Consequently, I have eliminated the 12.1 hours of attorney time incurred in pursuing Giannone's administrative appeals.

I am also of the view that Giannone's counsel dedicated an inordinate amount of time in their brief arguing progressively feeble theories of why a *de novo* review of her claim was appropriate when the application of the arbitrary and capricious standard was virtually compelled by the language of the policy, as any experienced ERISA attorney should have recognized. Attorney Crowley spent 53.25 hours and Attorney Feigenbaum nearly 30 hours in drafting the brief. I will consequently reduce the award for the hours expended on the brief by 20 percent (Crowley by 10.65 hours and Feigenbaum by 6 hours). I will also exclude the time Crowley spent preparing for an oral argument (11.75 hours) that was made by Feigenbaum. With regard to the reasonableness of the fees, I find that the $250 an hour rate charged by Attorney Feigenbaum is consistent with the typical rates charged by attorneys well versed in ERISA law. As Attorney Crowley has had comparatively little experience in the field (as reflected by the hours he billed for research

into areas that would be familiar to an ERISA specialist), the court believes that a reduced hourly rate of $200 in his case is appropriate.

ORDER

For the foregoing reasons, the application for attorneys' fees is ALLOWED. MetLife will reimburse Giannone attorneys' fees in the amount of $25,930.00 – consisting of an award to Attorney Feigenbaum of $10,400.00 ($250 x 41.60 hours), and an award to Attorney Crowley of $15,530.00 ($200 x 77.65 hours). The court additionally awards costs in the amount of $150.00.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE